

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2023] SC ABE 26

ABE-EP157-23

INTERLOCUTOR AND NOTE BY SHERIFF PHILIP MANN

in Petition by

MRS SUSAN GORDON

Petitioner

for

Appointment as Executrix-Dative *qua* Attorney of the Relict of the late Thomas Nicol Rae

ABERDEEN, 1 SEPTEMBER 2023

The sheriff, having considered the pursuer's motion number 7/1 of process, grants same and in terms thereof receives the pursuer's minute of amendment number 10 of process and allows the petition to be amended in terms thereof by substituting the word "Attorney" for the word "Representative" where it appears in the crave and in the plea in law; thereafter, having resumed consideration of the petition and having noted that neither the public guardian nor the Lord Advocate seeks to enter this process and that no objections have otherwise been lodged, appoints the pursuer Mrs Susan Gordon executrix-dative *qua* Attorney of the relict of the deceased Thomas Nicol Rae.

Sheriff Philip Mann

Note

[1] In this petition the pursuer, ultimately, seeks to be appointed executrix-dative of the deceased Thomas Nicol Rae *qua* Attorney of Mrs Eleanor Rae. Mrs Eleanor Rae is the widow of the deceased. The deceased left a will in which he appointed two executors both of whom predeceased him. Mrs Rae is the sole beneficiary under the will. She would be entitled to the office of executrix either in a nominate capacity by virtue of section 3 of The Executors (Scotland) Act 1900 or in a dative capacity *qua* relict of the deceased. However, Mrs Rae is *incapax*. The pursuer is the attorney of Mrs Rae in terms of a power of attorney granted by her on 10 November 2022 and registered by the Public Guardian on 30 January 2023.

[2] The original crave in the petition was for appointment *qua* representative. However, I had indicated to the pursuer's agent that I considered it to be inappropriate to seek appointment *qua* representative of Mrs Rae. A representative appointment is normally reserved for the confirmed executor of a deceased person who, if alive, would be entitled to the office of executor-dative. That is not the situation here. The real question in this case is whether or not the pursuer is entitled to be appointed as executrix-dative *qua* attorney of Mrs Rae. I have allowed the pursuer to amend the petition in appropriate terms.

[3] The foremost authority on the appointment of executors and on all commissary matters in general is *Currie on Confirmation of Executors*, which is currently in its ninth edition. There is a consistent theme running through *Currie* that it is not competent for the court to appoint an attorney to the office of executor-dative in place of an *incapax* whereas it is competent to appoint a guardian or the holder of an intervention order in respect of such a person to that office.

At paragraph 8-38 *Currie* says:

"A UK resident executor who is suffering from ill-health cannot competently delegate to an attorney power to give up an inventory to the deceased's estate, sign the declaration thereto, record the same in the court books, or crave confirmation in favour of the sick person, as executor."

At paragraph 8-43 *Currie* says:

"The power of attorney of a UK resident person will never enable the attorney to apply for confirmation on behalf of the *incapax*"

At paragraph 8-46 *Currie* says:

"The position is more difficult if it is the sole executor, or the last surviving executor, who has become *incapax*.....If the *incapax* is also the universal legatory, or sole general disponee or residuary legatee, the guardian (or holder of an intervention order) with appropriate powers ... may petition the sheriff to be decerned executor-dative *qua* guardian (or holder of an intervention order) to the *incapax* and decree will be granted.....An attorney cannot obtain confirmation on behalf of a UK resident *incapax*".

[4] In support of all of the foregoing propositions *Currie* refers to the case of *Leishman*, unreported December 17, 1980. Unfortunately, I do not have access to the judgment of sheriff Macvicar in *Leishman*, but the passage quoted by *Currie* at paragraph 8-38 seems to relate only to a possible executor who is unfit but *capax*, which is what *Currie* also appears to be referring to in that paragraph. I say this because the sheriff suggests that if a person who is entitled to be confirmed as executor does not feel able to accept the fiduciary responsibilities of the office and to carry out his duties in person, his proper course is to decline the office. It is trite that only someone who is *capax* can decline. *Leishman* does not appear to me to be authority for the proposition that it is incompetent to appoint an attorney of an individual who is *incapax*. I am inclined to disagree with *Currie* on this matter so far as it concerns an *incapax*. I take no exception to the proposition that it is incompetent to appoint an attorney in place of a UK resident who is *capax*.

[5] The situation in this case appears to be different from the case of *Leishman*. The person with the entitlement to be appointed executrix here is *incapax*. I can see no reason in principle why it should not be equally as competent to appoint an attorney as to appoint a guardian or the holder of an intervention order to the office of executor-dative *qua* such in these circumstances. All such representative parties are subject to the terms of the Adults with Incapacity (Scotland) Act 2000 (at least where the attorney is appointed after the coming into force of that Act). All are thus subject to supervisory powers of the public guardian and the court. All would require to find caution. One could argue that an attorney appointed by the person with the right to be appointed executor, and in whom that person has placed his trust, has a better claim to be appointed than a person appointed by the court. In many, if not most, cases the person who might be appointed attorney might also be the person who would be appointed guardian or intervener.

[6] It seems to me that there is a compelling public interest to ensure that the estates of deceased persons should be administered with the least possible delay and with the least possible expense. In a case where there is an attorney in place for an *incapax* individual with the right to be appointed executor, to insist that a guardian be appointed as a precursor to the appointment of an executor-dative does not satisfy that public interest.

[7] Before coming to a concluded view in this case I granted warrant to the pursuer to intimate the petition to the public guardian for her interest in her supervisory role in respect of powers of attorney and guardianships and to the Lord Advocate in the general public interest. I appended to that warrant a note setting out the foregoing views. Both the public guardian and the Lord Advocate, after due intimation, have declined the opportunity to enter process and make representations.

[8] The power of attorney in this case contains the following power:

“raise or defend any actions or judicial or other proceedings in which I am or may be interested so far as my Attorney may consider necessary or expedient.”

At paragraph 8-46 *Currie* accepts that such wording would give a guardian sufficient powers to petition for his appointment as executor-dative *qua* guardian. For the reasons set out in the preceding paragraphs I see no reason why that should not apply equally to an attorney.

I have granted the petition